Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-94

In the Supreme Court of the United States

OCTOBER TERM, 1988

KENTUCKY WEST VIRGINIA GAS COMPANY AND EQUITABLE GAS COMPANY, A DIVISION OF EQUITABLE RESOURCES, INC., PETITIONERS

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

WILLIAM A. MOGEL
Counsel of Record
WILLIAM R. MAPES, JR.
RANDALL C. SMITH
Ross Marsh Foster Myers & Quiggle
888 16th Street, N.W.
Washington, D.C. 20006
(202) 822-8888

ANDREW L. FREY
ANDREW J. PINCUS
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
A. The Filed Rate Doctrine	1
1. The Court of Appeals Erred by Concluding That Equitable Failed to Preserve its Filed Rate Doctrine Claim	2
2. A Remand is Appropriate in This Case	5
B. The Taking Claim	7
C. The Separate Counsel Requirement	9

TABLE OF AUTHORITIES

Cases:

Board of Trustees v. *Sweeney*, 439 U.S. 24 (1978)	5-6
Duquesne Light Co. v. *Barasch*, No. 87-1160	7
Henry v. *City of Rock Hill*, 376 U.S. 776 (1964)	5
Mississippi Power & Light Co. v. *Mississippi*, 108 S. Ct. 2428 (1988)	*passim*
Mitchell v. *United States*, 348 U.S. 905 (1955)	6
PUC v. *Equitable Gas Co.*, No. R-880932 (Pa. PUC Sept. 1, 1988)	7

Miscellaneous:

Pennsylvania Legislative Journal (1983)	8
Restatement (Second) of Contracts (1981)	5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-94

KENTUCKY WEST VIRGINIA GAS COMPANY AND EQUITABLE GAS COMPANY, A DIVISION OF EQUITABLE RESOURCES, INC., PETITIONERS

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR THE PETITIONERS

A. The Filed Rate Doctrine.

We contended in the petition (at 12-20) that (1) the Pennsylvania PUC violated the filed rate doctrine by disallowing recovery in 1985 through retail rates of gas costs that Equitable was obligated to incur under the minimum bill provision of the Kentucky West tariff approved by FERC; (2) the court of appeals compounded the PUC's mistake by erroneously concluding that Equitable had failed to preserve its claim under the filed rate doctrine; and (3) the court of appeals' error is closely related to the error corrected by this Court in *Mississippi Power*, which was decided after the court of appeals rendered its decision here. We seek only the limited relief of a remand to the court of appeals for reconsideration in light of *Mississippi Power*.

Respondents' answering briefs confirm that something is seriously amiss in the decisions rendered by the tribunals below. Little attempt is made to meet our legal argument on the merits and to show how the PUC's order barring Equitable from recovering its costs comported with the filed rate doctrine. Respondents instead hide behind "factual" findings and waiver determinations made at earlier stages of the case. Especially significant are FERC's recognition (Br. 9) of the merit of Equitable's claim under the filed rate doctrine and its acknowledgment (*ibid.*) that the court of appeals utilized a fundamentally flawed legal standard in concluding that Equitable did not preserve its filed rate doctrine claim.

Eager to divert attention from the indefensible determinations made by the PUC and the courts below, respondents devote much of their briefs to arguing that the issue relating to the application of the filed rate doctrine is "narrow," "factbound," or "unimportant." But those considerations are dispositive only when the Court is asked to give plenary review to an issue. Here, petitioners simply seek a remand to the court of appeals so that it may reconsider in light of *Mississippi Power* the very determinations that the respondents are unwilling or unable to defend before this Court. In view of the fact that this case presents issues concerning the application of the filed rate doctrine that this Court addressed in *Mississippi Power*, that course of action is plainly appropriate.

1. *The Court of Appeals Erred by Concluding That Equitable Failed to Preserve its Filed Rate Doctrine Claim.*

The court of appeals stated that "[t]he absence of any quantification leads us to conclude that Equitable failed to advance this [filed rate doctrine] theory for recovery at trial" (Pet. App. 23a). The court rested that conclusion on two different—and somewhat inconsistent—grounds. Each is incorrect as a matter of law.

The court of appeals relied in part upon what it found to be Equitable's failure to adduce in the district court facts showing what its minimum bill liability would have been if it had not purchased the gas from Kentucky West and how that liability related to the cost of the gas that Equitable did purchase (Pet. App. 22a-23a). The state respondents contend that the court was correct in demanding such proof as the prerequisite for a claim under the filed rate doctrine. As we show in the petition (at 18), however, and as FERC agrees (Br. 9), it was error to require the production of evidence "quantif[ying]" Equitable's claim. In a case like this, a court need only compare the costs at issue with the provisions of the federal tariff in order to ascertain whether the filed rate doctrine mandates recovery of those costs. No more specific factual development is required.[1]

The court of appeals' approach is wrong for the additional reason that the "quantification" evidence identified by the court—evidence relating to charges for gas *not* taken—would not even have been relevant to Equitable's claim, for Equitable sought to pass through in 1985 only payments for gas that was taken. The court apparently adopted the erroneous notion, repeated by the state respondents (PUC Br. 6 n.4; OCA Br. 5-6 n.2), that a minimum bill provision is relevant only when a utility seeks to recover payments for gas *not* taken; on this view, payments of amounts at or below the amounts required by the minimum bill, if accompanied by deliveries of gas, do not qualify as "minimum bill payments." We explain in the petition (at 14-15) that, because the minimum bill mandates the payment of a fixed amount to the

---

[1] Respondents thus err in asserting (PUC Br. 9-10; OCA Br. 8) that the petition seeks reexamination of the court of appeals' factual conclusions regarding the state of the record. The issue presented in this case is purely legal: we contend—and the FERC agrees—that the court of appeals committed a legal error by requiring a factual showing in the first place. In any event, the relevant facts and legal arguments were placed before the district court. See Pet. 18 n.17; Plaintiffs' Post-Trial Reply Br. at 7-8.

pipeline without regard to whether the utility takes delivery of the gas, all payments up to that amount are in satisfaction of the mandatory federally-imposed obligation and are entitled to the protection of the filed rate doctrine. FERC agrees (Br. 9 & n.5).[2]

The second part of the court of appeals' rationale was its decision to accord "preclusive effect" to the PUC's "factfinding" that the minimum bill obligation need not be considered in assessing the prudence of Equitable's gas purchases because "no minimum bill costs had ever actually been incurred" (Pet. App. 22a, 21a). This aspect of the decision suffers from a different, more significant, defect. The Court held in *Mississippi Power* that findings made in the course of a state-law prudence inquiry could not thwart the application of the filed rate doctrine. See 108 S. Ct. at 2440-2441. The court of appeals' approach, determining the applicability of the filed rate doctrine by according "preclusive effect" to the PUC's decision regarding the relevance of the federal tariff, is virtually identical to the standard condemned in *Mississippi Power* and therefore cannot stand in the face of that decision. See also Pet. 18-19.

FERC agrees that the court of appeals erred by imposing its "quantification" requirement upon Equitable, but it advances a wholly different ground—not relied on by the court of appeals—to justify the court of appeals' rejection of Equitable's filed rate doctrine claim. FERC suggests (Br. 9-10) that Equitable's declaration of *force*

[2] The absurdity of the PUC's position is readily shown. Suppose Equitable had simply disregarded the minimum bill completely and taken no gas from Kentucky West, meeting all its requirements by paying for deliveries from "less expensive" alternative sources. Equitable would then have been required by the minimum bill, even as ultimately modified by FERC, to pay Kentucky West millions of dollars, for which it would have received no gas. This payment to Kentucky West would have been conceded by the PUC to be a "minimum bill" payment. The fact that Equitable took delivery of the gas—for which it was obliged to pay in any event—and saved its ratepayers millions of dollars should not deprive it of the benefits of the filed rate doctrine.

majeure (see Pet. 6 n.6) might render the filed rate doctrine inapplicable to the costs at issue here.[3] This submission is quite odd: FERC does not claim that its new argument is actually correct, merely that because the theory *might* be right this Court need not grant relief with respect to the issues raised in the petition. But the speculative possibility that some other ground exists to withhold relief hardly justifies denying Equitable the opportunity to have its claims considered with the erroneous determinations cleared away. FERC or any other party would be free at that time to advance the *force majeure* theory on remand as a new ground for rejecting Equitable's claim.[4]

---

[3] According to FERC (Br. 9-10) the court of appeals actually concluded that the *force majeure* declaration freed the PUC to disregard the minimum bill provision. But this novel interpretation of the court's opinion—not advanced by any of the other parties—is clearly wrong. The part of the opinion upon which FERC relies is a description of the rationale of the PUC's decision, not an independent assessment of the correctness of that decision. Indeed, the very next paragraph of the opinion sets forth the legal basis for according preclusive effect to the PUC's determinations. Pet. App. 21a-22a. The court would have had no need to establish that it could defer to the PUC's decision if it had just endorsed that decision on the merits.

[4] In fact, FERC's theory is clearly wrong. First, Equitable's unilateral declaration of *force majeure* could not and did not suspend the legal effect of FERC's approved tariff. See Pet. 15 n.13. Second, Equitable's declaration of *force majeure* was based on a dramatic decline in demand for its gas—it was the oversupply of gas, and not the price in Kentucky West's tariff, that alone afforded any colorable basis for invoking *force majeure* under Equitable's contracts with its pipeline suppliers. It would have been frivolous to declare *force majeure* insofar as Equitable was actually able to make economic use of any portion of the gas subject to the minimum bill requirement. *Restatement (Second) of Contracts* § 261 (1981) (impracticability defense available only when "a party's performance is made impracticable"). FERC distorts our argument when it asserts (Br. 10) that we contend that the *force majeure* declaration is irrelevant because Equitable "did not intend" to disturb its minimum bill obligation. Rather, the declaration is irrelevant because Equitable could not as a matter of law

2. *A Remand is Appropriate in This Case.*

It is the consistent practice of this Court to vacate and remand a lower court decision for reconsideration in light of an intervening decision of this Court when it finds the intervening decision "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964); see also *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (remand is appropriate when "the intervening decision has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result"); *Mitchell* v. *United States*, 348 U.S. 905, 906 (1955) ("[w]e have not considered the merits of these cases, nor have we determined their relation to our recent opinions, supra, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the [intervening] decisions"). That standard is clearly satisfied here.

As we have discussed (see page 4, *supra*), *Mississippi Power* clarified the law in a manner that lays bare the court of appeals' error. Respondents do not deny that the court of appeals' approach endorses the very sort of circumvention of the filed rate doctrine condemned in *Mississippi Power*. Indeed, a number of trade associations, representing all segments of the gas industry, have filed *amicus* briefs in this Court expressing their concern that the decision is likely to result in confusion in the lower courts and threatens to undermine the filed rate doctrine. American Gas Ass'n (AGA) Br. 9-11; United Distribution Companies (UDC) Br. 4; Interstate Natural Gas Ass'n of America (INGAA) Br. 10. That doctrine is one of the cornerstones of utility regulation, applicable to a wide range of federal tariff provisions

---

obtain relief from the obligation where, as is the case with the purchases at issue here, it could at least to that extent render the performance required by the minimum bill provision.

other than minimum bills. AGA Br. 3-5; INGAA Br. 5-6.

Even if the relationship between *Mississippi Power* and the court of appeals' error were less clear, there are compelling reasons for a remand here. After all, a remand simply gives the court of appeals an opportunity to reconsider its ruling; Equitable will not prevail on the merits unless the court of appeals concludes that its claim is meritorious. In view of the substantial argument—endorsed by the FERC—that the court of appeals applied an erroneous legal standard in rejecting Equitable's claim, and in view of respondents' failure to provide a defense of the court of appeals' decision on the merits, further consideration of this case by the court of appeals is fully warranted.[5]

B. The Taking Claim.

The PUC's order barring Equitable from recovering its purchased gas costs rested upon the retroactive application of Act 74 to disallow expenses incurred prior to the effective date of that statute. See Pet. 20-24. Because the issue presented in the petition—whether such retroactive ratemaking violates the Takings Clause—is now before the Court in *Duquesne Light*, we suggested that, in the event the Court is not disposed to remand the case for reconsideration in light of *Mississippi Power*, it should be held for the decision in *Duquesne Light*.[6]

---

[5] FERC suggests (Br. 11-12) that a remand is unnecessary because Equitable may be entitled to recover the amounts at issue in a rate case during a later year. But the PUC has turned away Equitable's final effort to recover the costs at issue. See *PUC* v. *Equitable Gas Co.*, No. R-880932 (Pa. PUC Sept. 1, 1988). While Equitable plans to seek judicial review of that determination, the PUC is likely to argue, as it stated in this opinion (see slip op. 12), that Equitable's claim is precluded by the rationale it adopted in the present case. This case should be kept alive in order to assure that Equitable does not end up being whipsawed out of a meritorious claim of substantial importance to its financial well-being.

[6] The court of appeals did not address retroactivity because it erroneously thought that Equitable could have avoided the Act 74

The state respondents contend (PUC Br. 16-18; OCA Br. 14-20) that the PUC did not engage in retroactive ratemaking because Act 74 did not embody a new standard but simply codified the prior rule governing the recovery of purchased gas costs. If that were all the statute was meant to do, there would have been little need to adopt a new formulation; the legislature could simply have relied on the prior "just and reasonable" standard. But Act 74 did more than that; it is one of a wave of new state laws imposing tighter standards for recovery of purchased gas costs. See Pet. 19; UDC Br. 6-9; AGA Br. 10 n.5. Indeed, the plain language of the Act 74 standard, which sets forth a complex test dependent upon a variety of considerations not identified in the prior statute (see Pet. App. 173a-175a), establishes beyond any doubt that the statute imposes a new, stricter test for gas purchase costs.

The legislative history of Act 74 confirms this conclusion. The law was adopted to "put pressure on our 43 gas utilities in this State to buy the least costly gas" in order to "arrest th[e] unnecessary increase in the cost of gas." Pennsylvania Legislative Journal-House 1971 (remarks of Rep. Kukovich), 1973 (remarks of Rep. Freeman) (1983); see also *ibid.* (requirement that companies buy the "cheapest possible gas" would "no doubt [result in] savings to the consumer"); *id.* at 1975

---

standard by selecting another ratesetting procedure when it sought to recover the gas costs at issue here (see Pet. App. 35a). Neither of the state respondents defends the court's conclusion. The OCA argues (Br. 15-16 n.7) that Equitable could have foregone the gas purchase reimbursement process altogether by seeking a prospective increase in rates prior to July 1983. But Equitable would have had no reason to take that step, because Act 74 was not enacted until 1984. Thus, Equitable had no realistic alternative but to subject its claim to the Act 74 standard. See Pet. 23.

The PUC contends (Br. 18 n.7) that Equitable did not challenge the retroactive application of Act 74 in the courts below. But Equitable did raise a taking claim, and one element of that claim was the confiscatory effect of applying the restrictive Act 74 standard in evaluating the prudence of its gas purchases. See Pet. App. 33a-36a.

(remarks of Rep. Wambach) (adoption of Act 74 necessary because "[t]he PUC procedure does not allow for a thorough review of the utility's management and gas purchase decisions to insure that the utility company is trying to keep our costs as low as possible"). The legislature thus clearly intended to impose a more restrictive cost recovery standard.[7]

C. The Separate Counsel Requirement.

The requirement that Equitable retain separate counsel to represent ratepayers in FERC proceedings involving rate filings by Kentucky West unconstitutionally compels Equitable to advocate a particular viewpoint in those FERC proceedings regardless of whether it agrees or disagrees with that viewpoint. See Pet. 24-28. Respondents argue (PUC Br. 22-24; OCA Br. 22-24) that the order is justified because it cures the "inherent conflict" presented by Equitable's participation in Kentucky West rate proceedings (see OCA Br. 22). But there is no conflict—or, at least, there was none prior to the challenged order. Equitable and Kentucky West are sister companies owned by a single parent. It is up to that parent corporation—Equitable Resources, Inc.—to adjust the interests of its two subsidiaries in the manner that best serves its shareholders. Whenever Equitable's ratepayers have an interest in opposing Kentucky West before FERC, the PUC order almost by definition forces Equitable to speak against the interests of those shareholders.

Respondent cannot avoid the unacceptable consequences of the challenged order on the ground that it is content

---

[7] The state respondents contend that the PUC's disapproval under Act 74 of the gas purchasing strategy that it had approved under the prior standard (see Pet. 20-21) does not show that a new, stricter standard is applied under Act 74: they assert that Equitable's declaration of *force majeure* changed the factual circumstances and therefore led to a different result. But the PUC did not even mention the declaration of *force majeure* in rejecting Equitable's cost recovery claim; it therefore seems unlikely that this fact was determinative of Equitable's claim.

neutral because it does not force Equitable to advocate a particular point of view. As the PUC acknowledges in virtually the same breath (Br. 24), "Equitable was directed to defend the interests of its own customers." While the order may not dictate the precise position that Equitable must take with respect to particular issues before the FERC, it does require Equitable to further a particular point of view—that of its ratepayers. As such, the order plainly is not content-neutral.

Finally, respondents make the startling claim (PUC Br. 28; OCA Br. 25) that Equitable has not been harmed by the order and that its constitutional objection accordingly is not ripe. For the past three years, Equitable has complied with the order, paying separate counsel to present arguments opposing its sister company's proposed tariffs. Both because it has suffered monetary harm and because it has endured the very compelled speech that the Constitution prohibits, Equitable clearly has been injured by the PUC's order. The PUC's indefensible imposition on Equitable's right to manage its legal affairs as it sees fit should be ended.

Respectfully submitted.

WILLIAM A. MOGEL
Counsel of Record
WILLIAM R. MAPES, JR.
RANDALL C. SMITH
Ross Marsh Foster Myers & Quiggle
888 16th Street, N.W.
Washington, D.C. 20006
(202) 822-8888

ANDREW L. FREY
ANDREW J. PINCUS
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

OCTOBER 1988